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[Reserved]

§ 1.401(m)-5 *Definitions.*

[T.D. 9169, 69 FR 78184, Dec. 29, 2004, as amended by T.D. 9237, 71 FR 10, Jan. 3, 2006; T.D. 9447, 74 FR 8210, Feb. 24, 2009]

§ 1.401(m)-1 Employee contributions and matching contributions.

(a) *General nondiscrimination rules*—(1) *Nondiscriminatory amount of contributions*—(i) *Exclusive means of amounts testing.* A defined contribution plan does not satisfy section 401(a) for a plan year unless the amount of employee contributions and matching contributions to the plan for the plan

year satisfies section 401(a)(4). The amount of employee contributions and matching contributions under a plan satisfies the requirements of section 401(a)(4) with respect to amounts if and only if the amount of employee contributions and matching contributions satisfies the nondiscrimination test of section 401(m) under paragraph (b) of this section and the plan satisfies the additional requirements of paragraph (c) of this section. See § 1.401(a)(4)-1(b)(2)(ii)(B).

(ii) *Testing benefits, rights and features.* A plan that provides for employee contributions or matching contributions must satisfy the requirements of section 401(a)(4) relating to benefits, rights and features in addition to the requirement regarding amounts described in paragraph (a)(1)(i) of this section. For example, the right to make each level of employee contributions and the right to each level of matching contributions under the plan are benefits, rights or features subject to the requirements of section 401(a)(4). See § 1.401(a)(4)-4(e)(3)(i) and (iii)(F) through (G).

(2) *Matching contributions*—(i) *In general.* For purposes of section 401(m), this section and §§ 1.401(m)-2 through 1.401(m)-5, matching contributions are—

(A) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an employee contribution to a plan maintained by the employer;

(B) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an elective deferral; and

(C) Any forfeiture allocated on the basis of employee contributions, matching contributions, or elective deferrals.

(ii) *Employer contributions made on account of an employee contribution or elective deferral.* Whether an employer contribution is made on account of an employee contribution or an elective deferral is determined on the basis of all the relevant facts and circumstances, including the relationship between the employer contribution and employee actions outside the plan. An employer

contribution made to a defined contribution plan on account of contributions made by an employee under an employer-sponsored savings arrangement that are not held in a plan that is intended to be a qualified plan or other arrangement described in § 1.402(g)-1(b) is not a matching contribution.

(iii) *Employer contributions not on account of an employee contribution or elective deferral*—(A) *General rule.* Employer contributions are not matching contributions made on account of elective deferrals if they are contributed before the cash or deferred election is made or before the employees' performance of services with respect to which the elective deferrals are made (or when the cash that is subject to the cash or deferred elections would be currently available, if earlier). In addition, an employer contribution is not a matching contribution made on account of an employee contribution if it is contributed before the employee contribution.

(B) *Exceptions for forfeitures and released ESOP shares.* The rule of paragraph (a)(3)(iii)(A) of this section does not apply to a forfeiture that is allocated as a matching contribution. In addition, an allocation of shares from an ESOP loan suspense account described in § 54.4975-11(c) and (d) of this chapter will not fail to be treated as a matching contribution solely because the employer contribution that resulted in the release and allocation of those shares from the suspense account is made before the employees' performance of services with respect to which the elective deferrals are made (or when the cash that is subject to the cash or deferred elections would be currently available, if earlier) provided that—

(1) The contribution is for a required payment that is due under the loan terms; and

(2) The contribution is not made early with a principal purpose of accelerating deductions.

(C) *Exception for bona fide administrative considerations.* The timing of contributions will not be treated as failing to satisfy the requirements of this paragraph (a)(3)(iii) merely because contributions are occasionally made before the employees' performance of services with respect to which the elec-

tive deferrals are made (or when the cash that is subject to the cash or deferred elections would be currently available, if earlier) in order to accommodate bona fide administrative considerations and are not paid early with a principal purpose of accelerating deductions.

(3) *Employee contributions*—(i) *In general.* For purposes of section 401(m), this section and §§ 1.401(m)-2 through 1.401(m)-5, employee contributions are contributions to a plan that are designated or treated at the time of contribution as after-tax employee contributions (e.g., by treating the contributions as taxable income subject to applicable withholding requirements) and are allocated to an individual account for each eligible employee to which attributable earnings and losses are allocated. See § 1.401(k)-1(a)(2)(ii). The term *employee contributions* includes—

(A) Employee contributions to the defined contribution portion of a plan described in section 414(k);

(B) Employee contributions applied to the purchase of whole life insurance protection or survivor benefit protection under a defined contribution plan;

(C) Amounts attributable to excess contributions within the meaning of section 401(k)(8)(B) that are recharacterized as employee contributions under § 1.401(k)-2(b)(3); and

(D) Employee contributions to a plan or contract that satisfies the requirements of section 403(b).

(ii) *Certain contributions not treated as employee contributions.* The term *employee contributions* does not include designated Roth contributions, repayment of loans, rollover contributions, repayment of distributions described in section 411(a)(7)(C), or employee contributions that are transferred to the plan from another plan.

(iii) *Qualified cost-of-living arrangements.* Employee contributions to a qualified cost-of-living arrangement described in section 415(k)(2)(B) are treated as employee contributions to a defined contribution plan, without regard to the requirement that the employee contributions be allocated to an individual account to which attributable earnings and losses are allocated.

(b) *Nondiscrimination requirements for amount of contributions*—(1) *Matching contributions and employee contributions.* The matching contributions and employee contributions under a plan satisfy this paragraph (b) for a plan year only if the plan satisfies—

(i) The ACP test of section 401(m)(2) described in § 1.401(m)-2;

(ii) The ACP safe harbor provisions of section 401(m)(11) described in § 1.401(m)-3; or

(iii) The ACP safe harbor provisions of section 401(m)(12) described in § 1.401(m)-3; or

(iv) The SIMPLE 401(k) provisions of sections 401(k)(11) and 401(m)(10) described in § 1.401(k)-4.

(2) *Automatic satisfaction by certain plans.* Notwithstanding paragraph (b)(1) of this section, the requirements of this section are treated as satisfied with respect to employee contributions and matching contributions under a collectively bargained plan (or the portion of a plan) that automatically satisfies section 410(b). See §§ 1.401(a)(4)-1(c)(5) and 1.410(b)-2(b)(7). Additionally, the requirements of sections 401(a)(4) and 410(b) do not apply to a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof) and, accordingly such plans are not required to comply with this section. See sections 401(a)(5)(G), 403(b)(12)(C) and 410(c)(1)(A).

(3) *Anti-abuse provisions.* Sections 1.401(m)-1 through 1.401(m)-5 are designed to provide simple, practical rules that accommodate legitimate plan changes. At the same time, the rules are intended to be applied by employers in a manner that does not make use of changes in plan testing procedures or other plan provisions to inflate inappropriately the ACP for NHCEs (which is used as a benchmark for testing the ACP for HCEs) or to otherwise manipulate the non-discrimination testing requirements of this paragraph (b). Further, this paragraph (b) is part of the overall requirement that benefits or contributions not discriminate in favor of HCEs. Therefore, a plan will not be treated as satisfying the requirements of this para-

graph (b) if there are repeated changes to plan testing procedures or plan provisions that have the effect of distorting the ACP so as to increase significantly the permitted ACP for HCEs, or otherwise manipulate the non-discrimination rules of this paragraph, if a principal purpose of the changes was to achieve such a result.

(4) *Aggregation and restructuring*—(i) *In general.* This paragraph (b)(4) contains the exclusive rules for aggregating and disaggregating plans that provide for employee contributions and matching contributions for purposes of this section and §§ 1.401(m)-2 through 1.401(m)-5.

(ii) *Aggregation of employee contributions and matching contributions within a plan.* Except as otherwise specifically provided in this paragraph (b)(4) and § 1.401(m)-3(j)(6), a plan must be subject to a single test under paragraph (b)(1) of this section with respect to all employee contributions and matching contributions and all eligible employees under the plan. Thus, for example, if two groups of employees are eligible for matching contributions under a plan, all employee contributions and matching contributions under the plan must be subject to a single test, even if they have significantly different features, such as different rates of match.

(iii) *Aggregation of plans*—(A) *In general.* The term *plan* means a plan within the meaning of § 1.410(b)-7(a) and (b), after application of the mandatory disaggregation rules of § 1.410(b)-7(c), and the permissive aggregation rules of § 1.410(b)-7(d), as modified by paragraph (b)(4)(v) of this section. Thus, for example, two plans (within the meaning of § 1.410(b)-7(b)) that are treated as a single plan pursuant to the permissive aggregation rules of § 1.410(b)-7(d) are treated as a single plan for purposes of sections 401(k) and 401(m).

(B) *Arrangements with inconsistent ACP testing methods.* Pursuant to paragraph (b)(4)(ii) of this section, a single testing method must apply with respect to all employee contributions and matching contributions and all eligible employees under a plan. Thus, in applying the permissive aggregation rules of § 1.410(b)-7(d), an employer may

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not aggregate plans (within the meaning of § 1.410(b)-7(b)) that apply inconsistent testing methods. For example, a plan (within the meaning of § 1.410(b)-7) that applies the current year testing method may not be aggregated with another plan that applies the prior year testing method. Similarly, an employer may not aggregate a plan (within the meaning of § 1.410(b)-7) that is using the ACP safe harbor provisions of section 401(m)(11) or 401(m)(12) and another plan that is using the ACP test of section 401(m)(2).

(iv) *Disaggregation of plans and separate testing*—(A) *In general.* If employee contributions or matching contributions are included in a plan (within the meaning of § 1.410(b)-7(b)) that is mandatorily disaggregated under the rules of section 410(b) (as modified by this paragraph (b)(4)), the matching contributions and employee contributions under that plan must be disaggregated in a consistent manner. For example, in the case of an employer that is treated as operating qualified separate lines of business under section 414(r), if the eligible employees under a plan which provides for employee contributions or matching contributions are in more than one qualified separate line of business, only those employees within each qualified separate line of business may be taken into account in determining whether each disaggregated portion of the plan complies with the requirements of section 401(m), unless the employer is applying the special rule for employer-wide plans in § 1.414(r)-1(c)(2)(ii) with respect to the plan. Similarly, if a plan that provides for employee contributions or matching contributions under which employees are permitted to participate before they have completed the minimum age and service requirements of section 410(a)(1) applies section 410(b)(4)(B) for determining whether the plan complies with section 410(b)(1), then the plan must be treated as two separate plans, one comprising all eligible employees who have met the minimum age and service requirements of section 410(a)(1) and one comprising all eligible employees who have not met the minimum age and service requirements of section 410(a)(1), unless

the plan is using the rule in § 1.401(m)-2(a)(1)(iii)(A).

(B) *Restructuring prohibited.* Restructuring under § 1.401(a)(4)-9(c) may not be used to demonstrate compliance with the requirements of section 401(m). See § 1.401(a)(4)-9(c)(3)(ii).

(v) *Certain disaggregation rules not applicable.* The mandatory disaggregation rules relating to section 401(k) plans and section 401(m) plans set forth in § 1.410(b)-7(c)(1) and to ESOP and non-ESOP portions of a plan set forth in § 1.410(b)-7(c)(2) shall not apply for purposes of this section and §§ 1.401(m)-2 through 1.401(m)-5. Accordingly, notwithstanding § 1.410(b)-7(d)(2), an ESOP and a non-ESOP which are different plans (within the meaning of section 414(l), as described in § 1.410(b)-7(b)) are permitted to be aggregated for these purposes.

(c) *Additional requirements*—(1) *Separate testing for employee contributions and matching contributions.* Under § 1.410(b)-7(c)(1), the group of employees who are eligible to make employee contributions or eligible to receive matching contributions must satisfy the requirements of section 410(b) as if those employees were covered under a separate plan. The determination of whether the separate plan satisfies the requirements of section 410(b) must be made without regard to the modifications to the disaggregation rules set forth in paragraph (b)(4)(v) of this section. In addition, except as expressly permitted under section 401(k), 410(b)(2)(A)(ii), or 416(c)(2)(A), employee contributions, matching contributions and elective contributions taken into account under § 1.401(m)-2(a)(6) may not be taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the employee contributions or matching contributions are made) satisfy the requirements of section 401(a). See also § 1.401(a)(4)-11(g)(3)(vii) for special rules relating to corrections of violations of the minimum coverage requirements or discriminatory rates of matching contributions.

(2) *Plan provision requirement.* A plan that provides for employee contributions or matching contributions satisfies this section only if it provides that

the nondiscrimination requirements of section 401(m) will be met. Thus, the plan must provide for satisfaction of one of the specific alternatives described in paragraph (b)(1) of this section and, if with respect to that alternative there are optional choices, which of the optional choices will apply. For example, a plan that uses the ACP test of section 401(m)(2), as described in paragraph (b)(1)(i) of this section, must specify whether it is using the current year testing method or prior year testing method. Additionally, a plan that uses the prior year testing method must specify whether the ACP for eligible NHCEs for the first plan year is 3% or the ACP for the eligible HCEs for the first plan year. Similarly, a plan that uses the safe harbor method of section 401(m)(11) or 401(m)(12), as described in paragraphs (b)(1)(ii) and (b)(1)(iii) of this section, must specify the default percentages that apply for the plan year and whether the safe harbor contribution will be the nonelective safe harbor contribution or the matching safe harbor contribution, and is not permitted to provide that ACP testing will be used if the requirements for the safe harbor are not satisfied. For purposes of this paragraph (c)(2), a plan may incorporate by reference the provisions of section 401(m)(2) and § 1.401(m)-2 if that is the nondiscrimination test being applied. The Commissioner may, in guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter), specify the options that will apply under the plan if the nondiscrimination test is incorporated by reference in accordance with the preceding sentence.

(d) *Effective date*—(1) *General rule*. Except as otherwise provided in this paragraph (d), this section and §§ 1.401(m)-2 through 1.401(m)-5 apply to plan years that begin on or after January 1, 2006.

(2) *Early implementation permitted*. A plan is permitted to apply the rules of this section and §§ 1.401(m)-2 through 1.401(m)-5 to any plan year that ends after December 29, 2004, provided the plan applies all the rules of this section and §§ 1.401(m)-2 through 1.401(m)-5 and all the rules of §§ 1.401(k)-1 through 1.401(k)-6, to the extent applicable, for

that plan year and all subsequent plan years.

(3) *Applicability of prior regulations*. For any plan year, before a plan applies this section and §§ 1.401(m)-2 through 1.401(m)-5 (either the first plan year beginning on or after January 1, 2006 or such earlier year, as provided in paragraph (d)(2) of this section), § 1.401(m)-1 and § 1.401(m)-2 (as they appeared in the April 1, 2004 edition of 26 CFR part 1) apply to the plan to the extent those sections, as they so appear, reflect the statutory provisions of section 401(m) as in effect for the relevant year.

[T.D. 9169, 69 FR 78184, Dec. 29, 2004, as amended by T.D. 9447, 74 FR 8210, Feb. 24, 2009]

§ 1.401(m)-2 ACP test.

(a) *Actual contribution percentage (ACP) test*—(1) *In general*—(i) *ACP test formula*. A plan satisfies the ACP test for a plan year only if—

(A) The ACP for the eligible HCEs for the plan year is not more than the ACP for the eligible NHCEs for the applicable year multiplied by 1.25; or

(B) The excess of the ACP for the eligible HCEs for the plan year over the ACP for the eligible NHCEs for the applicable year is not more than 2 percentage points, and the ACP for the eligible HCEs for the plan year is not more than the ACP for the eligible NHCEs for the applicable year multiplied by 2.

(ii) *HCEs as sole eligible employees*. If, for the applicable year there are no eligible NHCEs (*i.e.*, all of the eligible employees under the plan for the applicable year are HCEs), the plan is deemed to satisfy the ACP test.

(iii) *Special rule for early participation*. If a plan providing for employee contributions or matching contributions provides that employees are eligible to participate before they have completed the minimum age and service requirements of section 410(a)(1)(A), and if the plan applies section 410(b)(4)(B) in determining whether the plan meets the requirements of section 410(b)(1), then in determining whether the plan meets the requirements under paragraph (a)(1) of this section either—

(A) Pursuant to section 401(m)(5)(C), the ACP test is performed under the plan (determined without regard to